UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

REV. CHARLES MAYFIELD, *et al.*,

Plaintiffs,

v.

CITY OF OAKLAND, *et al.*,

Defendants.

_____/

No. C-07-0583 EMC

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(Docket No. 6)

Plaintiffs Rev. Charles Mayfield, Rev. Alonzo Emerson, and Rev. Eddie Owens have sued Defendants the City of Oakland, Chief of Police Wayne Tucker, and various other individuals on the executive board of Oakland Police and Chaplains Together ("OPACT"), including the OPACT coordinator Melonie Levine. The City Defendants -- consisting of the City, Chief Tucker and Ms. Levine -- have filed a motion to dismiss, which the remaining individual defendants have joined. Having considered the parties' briefs and accompanying motions, the Court hereby **GRANTS** the motion to dismiss.

I. FACTUAL & PROCEDURAL BACKGROUND

In their first amended complaint ("FAC"), Plaintiffs allege as follows.

Plaintiffs were all volunteers with the City's Volunteer Police Chaplaincy Program. *See* FAC ¶ 3. "They underwent a significant period of training, obtained a substantial number of completed education units ('CEUs') and made personal and financial sacrifice to assume these responsibilities [as volunteers]." *Id.* The chaplaincy program is governed by OPACT. *See id.* ¶ 2. OPACT "is affiliated with the City of Oakland and its police department." *Id.*

Between 2002 and 2005, Ms. Levine, the OPACT coordinator, harassed Rev. Mayfield and Rev. Emerson by, *e.g.*, refusing to give them chaplaincy identification cards and losing their files. *See id.* ¶ 5. After Rev. Mayfield and Rev. Emerson complained -- both to public officials and OPACT's board -- the City's Deputy Chief of Police Michael Holland ordered that they be cleared and both reverends received their identification cards. *See id.*

In retaliation, Ms. Levine and other OPACT board members engaged in a pattern of harassment against Rev. Mayfield and Rev. Emerson. *See id.* ¶ 6. For example:

(1) Neither was allowed to obtain a badge and uniform, "the lack of which hobbled them from being able to effectively conduct their duties." *Id.*

(2) In or about July 2005, after Rev. Mayfield's identification card was stolen, Ms. Levine refused to give him another one and further refused to endorse him as a chaplain with the International Conference of Police Chaplains ("ICPC"), "which was necessary in order for Rev. Mayfield to become a 'full chaplain' rather than merely as 'associate chaplain.'" *Id.*

(3) Ms. Levine called all members of the OPACT executive board and "requested that they act in concert with her to remove Rev. Mayfield from the chaplaincy program." *Id.* ¶ 7. Ultimately, on February 9, 2006, Rev. Mayfield was informed by Chief Tucker that, on the recommendation of Ms. Levine and the board, he was being dismissed from the City's chaplaincy program. *See id.*

(4) In April 2007, Ms. Levine told Rev. Emerson that his records had been lost (for a fourth time) and that he would have to re-obtain fingerprint records, photographs, and other vital records and provide them to OPACT if he wanted to attain "full chaplaincy status and ICPC approval." *Id.* ¶ 11.

On March 11, 2006, approximately a month after being dismissed, Rev. Mayfield filed a complaint with Chief Tucker asking about the basis of his dismissal. *See id.* ¶ 8. On April 25, 2006, Rev. Mayfield sent a similar complaint to the Police Department's Internal Affairs. *See id.* Rev. Mayfield was never given an explanation nor was he given any process for challenging his dismissal. *See id.* On October 20, 2006, Rev. Mayfield filed a tort claim complaining about a lack

of due process, which was subsequently denied by the City. *See id.* ¶ 9; *see also* City Defs.' RJN, Ex. B.

On December 21, 2006, Rev. Owens was asked (on short notice) to attend an OPACT meeting. *See* FAC ¶ 10. (It is not clear whether, at this time, Rev. Owens was a member of the OPACT executive board. At some point, Rev. Owens resigned from the board. *See id.* ¶ 7.) At the meeting, Rev. Owens was asked about the situation with Rev. Mayfield. *See id.* ¶ 10. He was also asked about a letter he wrote to the City Administrator's Office, in which he apparently supported Rev. Mayfield in the face of Ms. Levine's opposition. *See id.* Ms. Levine told Rev. Owens to turn in his badge and identification card "on the spot." *Id.* When Rev. Owens refused, he was asked to sign a document stating that he would not discuss publicly what was said at the meeting. *See id.* Rev. Owens was told that, if he did not sign the document, he would be dismissed from the City's chaplaincy program. *See id.*

Based on the above, Rev. Mayfield asserts the following claims: (1) "constitutional violations" (both federal and state) against all Defendants, (2) violation of California Civil Code § 52.1 against all Defendants except Chief Tucker, and (3) negligence against all Defendants. Rev. Emerson and Rev. Owens also assert the same claims, and against all Defendants except Chief Tucker.

II. DISCUSSION

A. Federal Constitutional Claims

As noted above, Rev. Mayfield asserts that all Defendants violated his federal constitutional rights, and Rev. Emerson and Rev. Owens contend that all Defendants, except for Chief Tucker, violated their federal constitutional rights. *See* 42 U.S.C. § 1983.[1] The federal constitutional right at issue is that of free speech. More specifically, Plaintiffs argue that they were retaliated against

[1] The Court rejects Defendants' contention that Plaintiffs "do not even attempt to allege a Section 1983 claim." Mot. at 6. In the FAC, Plaintiffs assert that the Court has jurisdiction pursuant to, *inter alia*, § 1983. *See* FAC ¶ 1.

because of their exercise of their right to free speech.[2] *See, e.g.*, *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992) (concluding that "public officials may not deny or deprive a person of a governmental benefit or privilege on a basis that infringes her or his freedom of speech" and that "the opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny").

1. State Action

Defendants argue that Plaintiffs have failed to state a claim for relief under § 1983 because they have not alleged that Defendants are state actors. *See* 42 U.S.C. § 1983 (providing that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (noting that, "'[i]n cases under § 1983, "under color" of law has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment'"). This is not entirely true. The City is clearly a state actor, as is Chief Tucker. Rev. Mayfield has asserted claims against both the City and Chief Tucker; Rev. Emerson and Rev. Owens have asserted claims against the City.

However, the Court agrees with Defendants that Plaintiffs have not adequately alleged that any of the OPACT board members, including Ms. Levine, are state actors. There is no allegation in the FAC that OPACT is a City agency. According to the FAC, OPACT is "affiliated with the City of Oakland and its police department,"[3] *id.*, but that allegation, even if true, is not enough to establish that Ms. Levine or the other OPACT board members are state actors who can be held liable for a § 1983 violation. *See Monroe v. Pape*, 365 U.S. 167, 184 (1961) (stating that "[m]isuse of

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[2] In the opposition to the motion to dismiss, Rev. Mayfield claims that "presently" there is no cause of action for violation of procedural due process; "[r]etaliation is at the root of what happened to him." Opp'n at 2.

[3] Based on evidence submitted by the City Defendants in conjunction with a request for judicial notice, OPACT appears to be a nonprofit religious corporation (albeit one established, in essence, for the benefit of the City). *See* City Defs.' RJN, Ex. A.

power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law'").

Admittedly, a private actor can still be held liable for a § 1983 violation under certain circumstances. Under Ninth Circuit law,

> [a] private individual's action may be "under color of state law" where there is "significant" state involvement in the action. The Supreme Court has articulated four tests for determining whether a private individual's actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test.

Franklin v. Fox, 312 F.3d 423, 444-45 (9th Cir. 2002). However, based on the allegations in the FAC, none of the tests are applicable. For example, none of the Plaintiffs has alleged that the OPACT board members acted in concert with the City or Chief Tucker to deprive them of their constitutional rights. *See id.* at 445 ("Under the joint action test, 'courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights.'"). Nor, for instance, has Rev. Mayfield alleged that his dismissal from the chaplaincy program required the City or Chief Tucker's involvement. *See id.* (stating that, under the joint action test, the issue is "whether the state has so far insinuated itself into a position of interdependence with [the private actor] that it must be recognized as a joint participant in the challenged activity") (internal quotation marks omitted).[4]

Accordingly, the Court holds that all Plaintiffs have failed to allege a § 1983 claim against the OPACT board members, including Ms. Levine. There are insufficient allegations that the OPACT board members are state actors or are private actors who actions were taken under color of state law.

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[4] Counsel for Rev. Mayfield did attach to his declaration a document provided to him by his clients, which appears to be a Departmental General Order of the Oakland Police establishing or governing aspects of OPACT. *See* Simpich Decl., Ex. 1. However, the Court sustains Defendants' objection to the document, not only because it is hearsay and not authenticated but also because this is only a motion to dismiss. The Court does not address whether the General Order would be sufficient to establish state action on the part of OPACT in this case or, at the very least, raise a genuine dispute of material fact regarding state action.

In addition, even though the City is a state actor, the Court holds that Rev. Emerson and Rev. Owens have failed to state a § 1983 claim against it because their claims are based solely on the retaliatory acts of Ms. Levine and the other OPACT board members, *i.e.*, not any specific acts of the City.

2. Protected Speech

Although Rev. Mayfield has asserted a § 1983 claim against two state actors -- namely, the City and Chief Tucker – the Court concludes that this claim must also be dismissed for failure to state a claim for relief. Rev. Mayfield's theory seems to be that the City and Chief Tucker caused him harm by dismissing him from the chaplaincy program when the dismissal -- as recommended by Ms. Levine and the OPACT board -- was essentially retaliation for Rev. Mayfield's exercising his First Amendment rights.

The Supreme Court has stated that there are

> two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. . . . A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006). Although Rev. Mayfield was a volunteer in the chaplaincy program and not an employee, neither party disputes that the above analysis governing public employee free speech applies, assuming there is state action.

In the instant case, Rev. Mayfield has not satisfied the first requirement. More specifically, there are no allegations in the FAC that Rev. Mayfield was speaking on a matter of public concern. Under Supreme Court case law, a court must "examine the 'content, form, and context of a given statement' in order to determine whether an employee's speech addressed a matter of public concern." *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004). "[T]he standard for determining whether expression is of public concern is the same standard used to determine whether a

common-law action for invasion of privacy is present." *Id.* Invasion of privacy cases such as *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and *Time, Inc. v. Hill*, 385 U.S. 374 (1967), "make clear that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *Roe*, 543 U.S. 83-84. The Supreme Court has rejected the presumption that "all matters which transpire within a government office are of public concern," noting instead that, "[w]hile as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick v. Myers*, 461 U.S. 138, 149 (1983).

The FAC reflects that Rev. Mayfield was retaliated against after he complained about Ms. Levine's refusal to give him a chaplaincy identification card and her losing of his file.[5] *See* FAC ¶¶ 5-6. There is nothing about this speech that implicates a public concern; rather, the speech merely involves a complaint over internal office affairs. The Court finds *Connick* dispositive.

In *Connick*, the plaintiff, an assistant district attorney, was informed that she was going to be transferred to prosecute cases in a different section of the criminal court. *See id.* at 140. The plaintiff was opposed to the transfer and informed her superiors of such. When told by one of her supervisors that her concerns were not shared by others in the office, the plaintiff "prepared a questionnaire soliciting the views of her fellow staff members concerning transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.* at 141. The plaintiff then distributed

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[5] The FAC also refers to an occasion (no date is specified) on which a wrongful claim was made against Rev. Mayfield and states that Rev. Mayfield spoke with "interested parties, including some of the Defendants," and took action to illustrate the wrongfulness of the claim. FAC ¶ 4. However, there is no clear allegation that Rev. Mayfield was retaliated against for speaking with any of the Defendants about the wrongful claim; nor is there even any allegation about what the nature of the wrongful claim was. In the opposition to the motion to dismiss, Rev. Mayfield states that the wrongful claim was "an outrageous claim made by a woman alleging sexual misconduct," Opp'n at 2, but, on a motion to dismiss, the Court considers only the complaint and matters which may be judicially noticed. *See* 2-12 Moore's Fed. Prac. -- Civ. § 12.34[2] ("In deciding whether to dismiss, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice."). In any event, the FAC does not allege the retaliation was for any exercise of Rev. Mayfield's free speech in connection with this wrongful claim.

the questionnaire to fifteen assistant district attorneys. *See id.* After the plaintiff's supervisors learned about the distribution of the questionnaire, she was terminated. The plaintiff was told that she was being terminated because of her refusal to accept the transfer and that her distribution of the questionnaire was an act of insubordination. *See id.*

The Supreme Court held that,

> with but one exception, the questions posed by [the plaintiff] to her co-workers do not fall under the rubric of matters of "public concern." We view the questions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of [the plaintiff's] dispute over her transfer to another section of the criminal court. Unlike the dissent, we do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. [The plaintiff] did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did [the plaintiff] seek to bring to light actual or potential wrongdoing or breach of public trust on the part of [the supervisor] and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of [the plaintiff's] questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors.

Id. at 148.

In the instant case, Rev. Mayfield's situation is materially indistinguishable from that of the plaintiff in *Connick*. Rev. Mayfield's complaints about Ms. Levine's refusal to give him a chaplaincy identification card and her losing of his file are not of public import in evaluating the performance of OPACT, let alone the performance of Chief Tucker as a government official. The matters complained of were not a "subject of general interest and of value and concern to the public." *Roe*, *supra*, 543 U.S. at 83-84.

At the hearing, Rev. Mayfield suggested that a public concern was implicated by his speech because of the importance of the job that he was performing as a chaplain -- providing a service both to the City police officers and to the members of the public that interact with the officers. But this argument is not persuasive since no court has held that the speaker's job dictates whether his speech

is a matter of public concern. Certainly the job of an assistant district attorney is an important one; yet *Connick* found no First Amendment protection.

Accordingly, the Court concludes that Rev. Mayfield has failed to state a claim for relief under § 1983, both with respect to the City and to Chief Tucker.

B. State Constitutional Claims

Plaintiffs argue retaliation in violation of their rights under the state constitution as well as the federal constitution. The California Constitution provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const., art. I, § 2.

The problem for Plaintiffs is, once again, a failure to allege that they engaged in any speech that touched upon a matter of public concern. In *Cal. Teachers Ass'n v. Governing Bd.*, 45 Cal. App. 4th 1383, 1387 (1996), the court stated that, in evaluating public employee speech under the state constitution, "we must strike a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (internal quotation marks omitted). Significantly, the court cited *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) which established the basic analytical framework upon which *Connick* is based. It appears that the California courts apply the same analysis to public employee speech under the California constitution as the federal courts have applied under the First Amendment. Plaintiffs cite no authority to the contrary. Rev. Mayfield and Rev. Emerson have only alleged that they complained about Ms. Levine's refusal to give them chaplaincy identification cards and losing their files. *See* FAC ¶ 5. Rev. Owens has only alleged that he wrote a letter to the City Administrator's Office, in which he apparently supported Rev. Mayfield in the face of Ms. Levine's opposition. *See id.* ¶ 10. These expressive activities do not rise to the level of public concern sufficient to invoke constitutional protection.

Accordingly, all Plaintiffs' claims pursuant to the state constitution are dismissed for failure to state a claim for relief.

C. California Civil Code § 52.1

Under California Civil Code § 52.1,

> [a]ny individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a) [*i.e.*, by threat, intimidation, or coercion], may institute and prosecute in his or her own name and on his or her own behalf a civil action . . . .

Cal. Civ. Code § 52.1(b); *see also Austin B. v. Escondido Union School Dist.*, 149 Cal. App. 4th 860, 883 (2007) ("The essence of a Bane Act claim is that the defendant, by the specified improper means (*i.e.*, 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law."). Plaintiffs claim violations of § 52.1 based once again on a retaliation theory.

Although a § 52.1 claim can be raised in the employment context, *see Stamps v. Superior Court*, 136 Cal. App. 4th 1441, 1457 (2006) (rejecting the argument that an employment case could not be founded on § 52.1), the claim requires that there be a threat, intimidation, or coercion. In the instant case, Plaintiffs have failed to plead claims under § 52.1 because the FAC does not allege threat, intimidation, or coercion.

The Court acknowledges Rev. Owens's allegation that he was told to sign a document stating that he would not publicly discuss what was said at the OPACT meeting or otherwise he would be dismissed from the chaplaincy program. *See* FAC ¶ 10. However, this "threat" is not sufficient to state a claim for § 52.1. Although physical violence or a threat of physical violence is not required under the statute (except with respect to speech), *see Cole v. Doe*, 387 F. Supp. 2d 1084, 1103 (N.D. Cal. 2005) (concluding that use of law enforcement authority to effectuate a stop, detention, and search can constitute interference by threat, intimidation, or coercion, even if the police did not use excessive force); Cal. Civ. Code § 52.1(j) (providing in part that "[s]peech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the speech itself threatens violence against a specific person or group of persons"), the clear purpose of § 52.1 is to protect against *physical* harm and the use of *physical* force. *See Stamps*, 136 Cal. App. 4th at

1447 (noting that § 52.1 "was intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence"). There is nothing to indicate in its text or legislative history that § 52.1 protects against such purely nonphysical harm as economic sanctions, including dismissal from employment.

As a final point, the Court notes that, for the City -- but not Ms. Levine or the other OPACT board members[6] – there are additional reasons why Plaintiffs have failed to state a claim for relief under § 52.1. (As noted above, Plaintiffs have not asserted any § 52.1 claim against Chief Tucker.)

First, Rev. Emerson and Rev. Owens have failed to present their claims to the City as required by the CTCA. *See Taggart v. Solano County*, No. CIV-S-05-0783 DFL GGH, 2005 U.S. Dist. LEXIS 31799, at *12 (E.D. Cal. Dec. 6, 2005) ("The claim presentation requirement of the CTCA applies to 'all claims for money and damages.'") (quoting Cal. Gov't Code § 905); *Galvan v. Yates*, No. CV F 05-0986 AWI LJO, 2006 U.S. Dist. LEXIS 37301, at *24-25 (E.D. Cal. Feb. 8, 2006) ("Although the CTCA exempts certain statutory causes of action from its requirements, claims under sections 51 and 52.1 of the California Civil code are not among those statutes exempted."); *see also Gatto v. County of Sonoma*, 98 Cal. App. 4th 744, 760 (2002) ("It may well be, as appellants say, that many or perhaps even most actions under these statutes [*i.e.*, §§ 52, 52.1] seek only injunctive or declaratory relief, and not damages, but that provides no reason to exempt such actions from claim findings requirements where the plaintiff does seek to recover damages from a public entity and that is his or her chief purpose.") (emphasis omitted).

Second, Rev. Mayfield's § 52.1 claim for retaliation against the City is barred by the statute of limitations of the CTCA. Pursuant to California Government Code § 911.2, "[t]he CTCA requires a claimant to file a request for damages for injury to personal property with the government entity not later than six months after the accrual of the cause of action." *Henson v. Lassen County*, No. CIV. 05-CV-1099-FCD-KJM, 2006 U.S. Dist. LEXIS 50386, at *51 (E.D. Cal. July 20, 2006). The City's act of retaliation was dismissal of Rev. Mayfield from the chaplaincy program, and the

[6] It is not clear that Ms. Levine or any other OPACT board member is a public employee who could be protected by the California Tort Claims Act ("CTCA"). In fact, Ms. Levine and the other OPACT board members have suggested that they are not public employees.

dismissal occurred on February 9, 2006 -- more than six months before he presented his claim to the City on October 20, 2006.

Rev. Mayfield tries to make a continuing violations argument to save the § 52.1 claim, noting that the City failed to respond to the complaint that he made on April 25, 2006 with the Internal Affairs of the Police Department. But the City's failure to respond to that complaint cannot be characterized as part of a continuing course of retaliatory conduct, which would be necessary in order for the continuing violations theory to apply. Rather, the dismissal of Rev. Mayfield was a discrete act of retaliation.[7] *See Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1058-59 (2005) (refusing to "foreclos[e] the application of the continuing violation doctrine in a case such as this one, where the plaintiff alleges a retaliatory course of conduct rather than a discrete act of retaliation").

D. Negligence

Finally, Plaintiffs assert claims of negligence against Defendants. More specifically, Rev. Mayfield alleges negligence by all Defendants, while Rev. Emerson and Rev. Owens contend that all Defendants, except for Chief Tucker, acted negligently.

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[7] Although the Court agrees with the City that the CTCA bars the § 52.1 claims for the reasons stated above, the Court rejects the City's argument that the claims should be dismissed because Plaintiffs have failed to allege a specific enactment that gives rise to a mandatory duty on the part of the City.

It is true that, under California Government Code § 815, the City cannot be held liable for an injury unless there is a statute allowing for liability. *See* Cal. Gov't Code § 815 ("Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."). It is also true that, under California Government Code § 815.6, a public entity can be held liable for an injury proximately caused by its failure to discharge a mandatory duty imposed by an enactment. *See id.* § 815.6 ("Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.").

However, § 815.6 "is not the only route to entity liability." *Bradford v. California*, 36 Cal. App. 3d 16, 19 (1973). "Section 815.6 provides a basis of direct entity liability entirely independent of the derivative liability created in section 815.2." *Id.* Under § 815.2, a public entity such as the City can be held liable for the torts of its employees. *See* Cal. Gov't Code § 815.2(a) ("A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.").

Defendants argue that the negligence claims should be dismissed because they are too vague to state a claim for relief. Although only notice pleading is required by Federal Rule of Civil Procedure 8(a), the Court agrees that the negligence claims as pleaded are so lacking in clarity that they fail to satisfy even the bare requirements of notice pleading. "In order to prevail in an action based upon a defendant's alleged negligence, a plaintiff must demonstrate that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of his or her injuries." *Morris v. De La Torre*, 36 Cal. 4th 260, 264 (2005). Plaintiffs do not provide any specific information in the FAC about any of these elements and instead only state in conclusory terms that, "[d]ue to the actions of Defendants as described above, the tort of negligence was inflicted upon Plaintiffs." FAC ¶ 18.

Furthermore, for the same reasons discussed above, *see* Part II.C, *infra*, the City and Chief Tucker have defenses under the CTCA to any claim of negligence by Rev. Emerson and Rev. Owens (*i.e.*, failure to present) and to Rev. Mayfield's claim of wrongdoing not occurring within the statute of limitations.

III. CONCLUSION

For the foregoing reasons, the Court grants Defendants' motion to dismiss. Plaintiffs have failed to state a claim for relief under § 1983, under the California constitution, under § 52.1, and for negligence.

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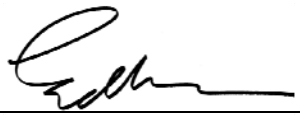
Although the Court is skeptical of any further attempt to state a claim under § 1983, the state constitution, or § 52.1, given the above public employee speech analysis, it will permit Plaintiffs, should they so choose, to amend their complaint to cure the legal deficiencies discussed above. The Court will also permit Plaintiffs another opportunity to state more clearly their claim for negligence. Plaintiffs shall be mindful that any new allegations must satisfy Fed. R. Civ. P. 11. Any amended complaint shall be filed within 30 days of the date of this Order.

This order disposes of Docket No. 6.

IT IS SO ORDERED.

Dated: August 6, 2007



EDWARD M. CHEN
United States Magistrate Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

REV. CHARLES MAYFIELD, *et al.*,

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_____/

No. C-07-0583 EMC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the U.S. District Court, Northern District of California. On the below date, I served a true and correct copy of the attached, by placing said copy/copies in a postage-paid envelope addressed to the person(s) listed below, by depositing said envelope in the U.S. Mail; or by placing said copy/copies into an inter-office delivery receptacle located in the Office of the Clerk.

James Shum
455 Seventh Street
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Dated: August 6, 2007

RICHARD W. WIEKING, CLERK
By: Leni Doyle
Deputy Clerk